8

FILED
FEB 9 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term 1951

No. 575

MEYER SCHNEIDER,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

JACOB W. FRIEDMAN,
Attorney for Petitioner,
170 Broadway,
Borough of Manhattan,
City of New York.

INDEX

PAGE

PETITION:

Statement of Matters Involved 2

Questions Presented 3

Reasons for Allowance of Writ 4

BRIEF:

Opinion Below 5

Jurisdiction 5

Statute Involved 6

Statement of the Case 6

Specification of Errors to be Urged 6

ARGUMENT:

1—The indictment is legally insufficient in that it confuses offer and promise and neither count thereof describes the duties or official function of the person to whom the alleged bribe was promised or given, or the decision, matter or action involved 7

2—The Government failed to prove that the supposed offeree of the bribe was vested with any authority or official duty concerning the sale or disposition of Government surplus property, and otherwise failed to prove the commission of a crime within the intent of the applicable statute 14

3—The Government made improper references to other offenses allegedly committed by petitioner 19

PAGE

4—The Trial Court erroneously received in evidence prejudicial testimony of one Walker concerning three alleged telephone conversations with petitioner in the absence of any proper foundation or identification of the person with whom those conversations were had 4

5—The Trial Court erroneously refused to permit petitioner's counsel to inspect memoranda used by the witness Matthews to refresh his recollection 21

6—The undisputed evidence showed an elaborate plan to entice petitioner to offer a bribe, so as affirmatively to sustain his defense of entrapment and to necessitate a judgment of acquittal, or, in any event, to require the submission of that issue to the jury 22

CONCLUSION 34

TABLE OF CASES, STATUTES AND AUTHORITIES CITED

PAGE

Blunden v. United States, 169 F. 2d 991 ..... 11, 19
Boyd v. United States, 142 U. S. 450 20
Boy Kin v. United States, 11 F. 2d 484 11
Brenner v. United States, 287 F. 366 11
Brownlaw v. United States, 8 F. 2d 711 22

Capuano v. United States, 9 F. 2d 41 24
Carney v. United States, 163 F. 2d 784 ..... 10, 17

Gargano v. United States, 240 F. 60 24
Greer v. United States, 245 U. S. 559 20

Harris v. United States, 104 F. 2d 41 11

PAGE

Kellerman v. United States, 295 F. 796 12
Krichman v. United States, 256 U. S. 363 17
Krulewitch v. United States, 336 U. S. 440 20
Kutler v. United States, 79 F. 2d 440 17

Lennon v. United States, 20 F. 2d 490 22
Luse v. United States, 49 F. 2d 241 22

McCoy v. United States, 169 F. 2d 776 20
Malatkofski v. United States, 179 F. 2d 905 9
Michelson v. United States, 335 U. S. 469 20

Newman v. United States, 299 F. 131 24
Nordgren v. United States, 181 F. 2d 718 12

Pettibone v. United States, 148 U. S. 197 11

Robilio v. United States, 291 F. 975 21

San Yick v. United States, 240 F. 60 24
Schneider v. United States, 192 F. 2d 498 5
Schraeder v. People, 73 Colo. 400 11
Selvidge v. State, 126 Tex. Cr. 489 11
Shields v. United States, 26 F. 2d 993 14
Sorrells v. United States, 287 U. S. 435 22
State v. Butler, 178 Mo. 272 11
Sugarman v. State, 173 Md. 52 11

Taylor v. State, 42 Ga. App. 443 11
Taylor v. United States, 19 F. 2d 813 22
Templeton v. United States, 151 F. 2d 706 20

U. S. v. Christopherson (D. C. Mo., 1919), 261 F. 224 11
U. S. v. Dressler (C. C. A. 7), 112 F. 2d 972 20
U. S. v. Fronkel (C. C. A. 2, 1933), 65 F. 2d 285, cert. den. 290 U. S. 682, 78 L. Ed. 588 21
U. S. v. Gibson (D. C. Ill., 1891), 47 F. 833 11
U. S. v. Kemler (D. C. Mass., 1942), 44 F. Supp. 649 ..... 8, 9, 10, 11, 14
U. S. v. Lynch (D. C. N. Y., 1918), 256 F. 893 23
U. S. v. Marcus (C. C. A. 3, 1948), 166 F. 2d 497 12

PAGE

U. S. v. McGuire (C. C. A. 2, 1933), 64 F. 2d 486, cert. den. 290 U. S. 645 11
U. S. v. Michaelson (C. C. A. 2), 165 F. 2d 732 ..... 9, 10
U. S. v. Patterson (D. C. Fla., 1923), 286 F. 760 11

Wallace v. United States, 291 F. 972 21
White v. United States, 67 F. 2d 71 11
Woo Wai v. United States, 223 F. 412 24

Ybor v. United States, 31 F. 2d 42 24
Yee Gee, Re, 83 F. 145 11

Zambroni v. United States, 170 F. 2d 272 11

TEXT

Underhill on Criminal Evidence 21

STATUTE

18 U. S. Code, Sec. 201 ..... 6, 13, 15, 28
28 U. S. Code, Sec. 1254, subd. 1 5

IN THE

Supreme Court of the United States

October Term 1951

No.....

MEYER SCHNEIDER,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Meyer Schneider, respectfully prays for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review a judgment of that Court, filed and entered on or about August 21, 1951, reversing a judgment of the United States District Court for the District of Montana, entered in that Court on or about December 15, 1949, convicting petitioner of an offer and payment of money to an officer of the United States, in violation of 18 United States Code, Section 201. The judgment of the said Court of Appeals reversed the conviction on one ground and directed a new trial, rejecting, however, other points advanced by petitioner, and to the extent that these points were rejected the petitioner now seeks further review.

Statement of Matters Involved

This is a criminal prosecution wherein defendant was indicted in the United States District Court for the District of Montana in an indictment (R. 2-4) containing two counts. The first was described as "offer of bribe", but alleged that on November 22, 1948, the petitioner promised to a certain Lieutenant Apperson a bribe to influence his decision and action in a matter pending before him in his official capacity. The second count alleged the giving of a bribe of $1,500 to the same person for the same purpose on November 23, 1948. Petitioner's motions to dismiss the indictment and for a judgment of acquittal were denied and exception taken (R. 4-9, 10-15). A motion to withdraw the first count from the jury's consideration on the ground that it was merged in the second count and did not constitute a second crime was likewise denied (R. 15-16). Petitioner was found guilty by the jury as charged (R. 17-18) and was sentenced to a term of one year and six months imprisonment and a fine of $4,500 (R. 19-22). Petitioner filed notice of appeal to the Court of Appeals on December 16, 1949 (R. 22-23) and was continued on bail by the District Judge during the pendency of the appeal (R. 381-384).

The appeal to the Court of Appeals was duly argued on January 15, 1951, and resulted in a unanimous judgment of reversal on August 21, 1951 (R. 405). An opinion was rendered by Biggs, Circ. J., concurred in by Denman, C. J., and Stephens, Circ. J. (R. 392-404). A new trial was ordered. The reversal was based solely on an error in the charge on the subject of criminal negligence (R. 401-404), the Court holding that petitioner could not possibly have negligently offered a bribe or given one but that the jury under the instructions given could have concluded that mere careless conduct on his part was sufficient to sustain his guilt (R. 404).

Subsequent petitions for rehearing were duly filed on September 18 and 20, 1951, by both appellant and appellee,

and these petitions were denied on December 11, 1951 (R. 406). On December 31, 1951, Associate Justice Douglas duly signed an order extending the time for filing petition for writ of certiorari herein to and including February 9, 1952.

Questions Presented

The questions involved and the grounds of appeal are briefly as follows:

1. The indictment is legally insufficient in that it confuses offer and promise and neither count thereof describes the duties or official functions of the person to whom the alleged bribe was promised or given, or the decision, matter or action involved.

2. The Government failed to prove that the supposed offeree of the bribe was vested with any authority or official duty concerning the sale or disposition of Government surplus property, and otherwise failed to prove the commission of a crime within the intent of the applicable statute.

3. The Government made improper references to other offenses allegedly committed by petitioner.

4. The Trial Court erroneously received in evidence prejudicial testimony of one Walker concerning three alleged telephone conversations with petitioner in the absence of any proper foundation or identification of the person with whom those conversations were had.

5. The Trial Court erroneously refused to permit petitioner's counsel to inspect memoranda used by the witness Matthews to refresh his recollection.

6. The undisputed evidence showed an alaborate plan to entice petitioner to offer a bribe, so as affirmatively to sustain his defense of entrapment and to necessitate a judgment of acquittal, or, in any event, to require the submission of that issue to the jury.

Reasons for Allowance of Writ

The basic reasons offered by petitioner for the allowance of certiorari herein are substantially coextensive with the propositions outlined above as the questions presented. Several of the points, if sustained, would result in a dismissal of the indictment, whereas others would insure against the repetition of errors on a retrial.

The rulings sought to be reviewed raise important questions of Federal law which may not have been explicitly, but should be, settled by this Court. Moreover, the decision rendered appears to be in conflict with decisions in other circuits, as well as with the reasoning of applicable decisions of the Supreme Court of the United States. Finally, the holding sought to be reviewed, to the effect that petitioner's rights were not invaded on any of the points, as well as that he was not prejudiced by the improper evidence received, so far sanctions a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit commanding said Court to certify and send to this Court, at a day to be designated, a full and complete transcript of the record and all proceedings of said Court of Appeals had in this cause, to the end that the cause may be reviewed and determined by this Court: that the judgment of the Court of Appeals be modified accordingly; and that petitioner may be granted such other and further relief as may seem proper.

Dated: New York, N. Y., February 6, 1952.

MEYER SCHNEIDER,
Petitioner,

By JACOB W. FRIEDMAN,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

October Term 1951

No._____

MEYER SCHNEIDER,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION

Opinion Below

The opinion of the Court of Appeals is appended to the certified transcript of record and is reported in 192 F. 2d 498. No opinion was rendered herein by the District Court.

Jurisdiction

The judgment of the Court of Appeals now sought to be reviewed was rendered on August 21, 1951, and petitioner's application for rehearing, duly filed on September 18, 1951, was denied on December 11, 1951. Mr. Justice Douglas, on December 31, 1951, signed an order extending the time for filing petition for writ of certiorari herein to and including February 9, 1952. The jurisdiction of the Supreme Court of the United States is invoked under 28 U. S. Code, Sec. 1254, subd. 1 (June 25, 1948, C. 646, Sec. 1, 62 Stat. 928).

Statute Involved

18 U. S. Code, Sec. 201 (June 25, 1948, C. 645, Sec. 1, 62 Stat. 691), provides as follows:

> "SECTION 201. *Offer to Officer or Other Person.*— Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both."

Statement of the Case

A summary statement of the case is set forth in the petition, supra. A summary of the argument is contained in the index.

Specification of Errors to be Urged

It is intended to urge the following errors:

1. The indictment is legally insufficient in that it confuses offer and promise and neither count thereof describes

the duties or official function of the person to whom the alleged bribe was promised or given, or the decision, matter or action involved.

2. The Government failed to prove that the supposed offeree of the bribe was vested with any authority or official duty concerning the sale or disposition of Government surplus property, and otherwise failed to prove the commission of a crime within the intent of the applicable statute.

3. The Government made improper references to other offenses allegedly committed by petitioner.

4. The Trial Court erroneously received in evidence prejudicial testimony of one Walker concerning three alleged telephone conversations with petitioner in the absence of any proper foundation or identification of the person with whom those conversations were had.

5. The Trial Court erroneously refused to permit petitioner's counsel to inspect memoranda used by the witness Matthews to refresh his recollection.

6. The undisputed evidence showed an elaborate plan to entice petitioner to offer a bribe, so as affirmatively to sustain his defense of entrapment and to necessitate a judgment of acquittal, or, in any event, to require the submission of that issue to the jury.

Argument

1

The indictment is legally insufficient in that it confuses offer and promise and neither count thereof describes the duties or official function of the person to whom the alleged bribe was promised or given, or the decision, matter or action involved.

This point was duly raised and protected by various motions, exceptions and assignments of error (R. 4-7, 8-9, 11, 29-30, 335, 348, 386).

The first count of the indictment (R. 2-3) reads as follows:

> "THE GRAND JURY CHARGES:
>
> COUNT ONE
>
> (Offer of Bribe)
>
> (18-201)
>
> "That on or about the 22nd day of November, 1948, in the state and district of Montana and within the jurisdiction of this Court, Meyer Schneider unlawfully and feloniously promised money to a certain officer and person acting for and on behalf of the United States in an official function, to-wit: Harvey B. Apperson, First Lieutenant, United States Air Force and Base Salvage Officer of the Great Falls United States Air Force Base, as the defendant well knew, for the purpose and with the intent to influence the decision and action of the said Harvey B. Apperson in his official capacity and function, as aforesaid, on a certain matter then pending before him in his official capacity, as the defendant well knew, and for the purpose and with the intent to influence the said Harvy B. Apperson, as aforesaid, to allow and make opportunity for the commission of a fraud on the United States and to induce the said Harvey B. Apperson acting as aforesaid, as the defendant well knew, to do an act in violation of his lawful duty, as the defendant well knew, in respect to the disposal of salvage property of the United States, as aforesaid."

To begin with, the caption on the count ("Offer of Bribe") differs from the first count which it is designed to describe but which in fact charges a promise of a bribe. A reference to the statute discloses that it differentiates between the two offenses of offering and promising and that they are not synonymous terms. A defendant may be convicted on either one of these charges. See *United States* v. *Kemler* (D. C. Mass., 1942), 44 F. Supp. 649. Therefore, there is a doubt as to the Grand Jury's intent and meaning in this count, to which discrepancy a prompt objection was

overruled (R. 6). The description is not an endorsement or something extraneous to the indictment but appears immediately below the indicting words, so as to create an immediate doubt as to whether the Grand Jury intended to charge an offer or a promise, a matter which any defendant is entitled to know in advance of trial. The ambiguous form of indictment gave the Government an entirely unwarranted latitude in presenting proof of equivocal character so as to enable it to take advantage of whichever interpretation was more in consonance with the evidence, and caused such confusion that the Judge himself described the count as charging an offer (R. 357).

The opinion rendered herein by the Court of Appeals failed to differentiate between these two manners of committing the offense, although it is well established that they constitute entirely different and distinguishable crimes. *United States* v. *Michaelson* (C. C. A. 2), 165 F. 2d 732. Moreover, in *United States* v. *Kemler* (1942), 44 F. Supp. 649, the Court held that there were three distinct methods of committing the statutory offense, namely, offering, promising and giving. See also *Malatkofski* v. *United States* (C. C. A. 1, 1950), 179 F. 2d 905. Herein both Courts below appear to have ignored the allegation of promising in the indictment and referred to the case as though it involved merely an offer (R. 396-397).

Petitioner is not accurately apprised of the offense of which he is accused when there is a patent discrepancy between the caption and the violation alleged. He cannot even at this point say with what crime he was charged or of what violation of law he was convicted. These are things which should readily be ascertainable from an inspection of the indictment, from the standpoint of conducting an effective defense, protecting his rights with respect to double jeopardy and other considerations affecting a conviction. The indictment is susceptible of the meaning that the Grand Jury intended to accuse defendant of an offer of a bribe, but a grave doubt of this was introduced by its proceeding to allege a promise. Since it is not per-

missible to speculate as to the Grand Jury's meaning, a fatal ambiguity has been introduced into the charge, in contravention of elementary requirements of criminal pleading. *Carney* v. *United States* (C. C. A. 9, 1947), 163 F. 2d 784.

The best that could be said for the Government's position would be that if the caption on the first count of the indictment referred to an offer to bribe while the body of the indictment referred to a promise to bribe, the body would have to control. The difficulty with this argument is that neither Court below took this position, but actually the offer and promise were confused and referred to as though they were interchangeable. In the instructions to the jury the Trial Court several times (R. 356, 357, 358) referred to the first count as accusing petitioner of an offer of bribe. This was done notwithstanding petitioner's motion to dismiss the first count because of its failure to apprise him whether the Government intended to prove a promise or an offer (R. 6). Similarly, the Court of Appeals several times mentioned the first count of the indictment as charging an offer (R. 392, 396, twice on the latter page). Moreover, the Court of Appeals did not so much as discuss the discrepancy in language, although the point was fully brought to its attention. As we have indicated above, Federal courts in the First and Second Circuits have drawn a sharp and well-defined distinction between offer and promise as employed in the statute under consideration. *United States* v. *Michaelson* (C. C. A. 2), 165 F. 2d 732; *Malatkofski* v. *United States* (C. C. A. 1), 179 F. 2d 905; *United States* v. *Kemler* (D. C. Mass.), 44 F. Supp. 649. Accordingly, the present holding is in conflict with authorities in other circuits on an important point of criminal procedure, affecting substantial rights, and on this phase of the case it would appear desirable that certiorari should be granted to the end that the law may be rendered uniform. The apparent rationale of the holdings of the Trial Court and the Court of Appeals herein is that the Courts considered themselves at liberty to import the caption into the body of the indictment and thereby

completely change its purport. We do not believe that such procedure is sanctioned by any judicial authority, and the practice constitutes such an unauthorized departure from the accepted practice in criminal causes as to call for correction by this Court. The petitioner herein has experienced the impact of this confusion to the point where he was in effect tried for the commission of a crime merely specified in a caption but absent from the body of the indictment, and we are aware of no reported case where the liberty of an individual has been placed in jeopardy by a mere designation of a felony as distinguished from a formal recital indicting him for a recognizable offense.

A second and entirely independent defect in the indictment, applicable to both counts, is that the duties or official functions of the person bribed are not alleged. This requirement is established by a long line of cases, representative of which are *United States* v. *Kemler* (D. C. Mass., 1942), 44 F. Supp. 649; *United States* v. *Patterson* (D. C. Fla., 1923), 286 F. 760; *United States* v. *Gibson* (D. C. Ill., 1891), 47 F. 833; *United States* v. *Christopherson* (D. C. Mo., 1919), 261 F. 224; *Boykin* v. *United States* (C. C. A. 5, 1926), 11 F. 2d 484; *Re Yee Gee* (D. C. Wash., 1897), 83 F. 145; *Blunden* v. *United States* (C. C. A. 6, 1948), 169 F. 2d 991; *Zambroni* v. *United States* (C. C. A. 6, 1948), 170 F. 2d 272; *Pettibone* v. *United States,* 148 U. S. 197, 37 L. Ed. 419; *Harris* v. *United States* (C. C. A. 8, 1939), 104 F. 2d 41; *United States* v. *McGuire* (C. C. A. 2, 1933), 64 F. 2d 486, cert. den. 290 U. S. 645; *White* v. *United States* (C. C. A. 10, 1933), 67 F. 2d 71, and *Brenner* v. *United States* (C. C. A. 2, 1922), 287 F. 366. The same rule has been applied in various State cases, such as *Taylor* v. *State,* 42 Ga. App. 443, 156 S. E. 623; *Selvidge* v. *State,* 126 Tex. Cr. 489, 72 S. W. 2d 1079; *Sugarman* v. *State,* 173 Md. 52, 195 A. 324; *State* v. *Butler,* 178 Mo. 272, 77 S. W. 560; *Schraeder* v. *People,* 73 Colo. 400, 215 P. 869.

In many of the cases mentioned above the prosecution had not only proceeded on a defective indictment but had

failed to offer the proof necessary to support a statutory ingredient of the offense. A consideration of the present indictment in the light of the minimum requirements of law is indicative that it fails to charge the commission of any crime under the statute and that no conviction may be lawfully predicated thereon. The most substantial shortcoming is that a reading of the indictment fails to disclose the matter pending before Apperson, the character of the decision or action intended to be influenced, or the nature of the unlawful act which the defendant was attempting to induce. In the absence of such averments the indictment should not be permitted to stand. In addition to the cases heretofore cited, several pertinent authorities establishing the rule that the exact official function must be alleged are *Kellerman* v. *United States* (C. C. A. 3, 1924), 295 F. 796; *United States* v. *Marcus* (C. C. A. 3, 1948), 166 F. 2d 497, and *Nordgren* v. *United States* (C. C. A. 9, 1950), 181 F. 2d 718.

The omission of the indictment specifically to detail the duties of the "officer and person" sought to be bribed was apparently recognized by the Court of Appeals, for it said (R. 397):

> "We can conceive of situations where more specific allegations as to an officer's duties would be necessary in order to show that the act or omission to which the bribe was directed was within the scope of official conduct."

This is rather an understatement, but is tantamount to an admission that the indictment was deficient in the respect indicated. However, the Court satisfied itself in this particular by the following observation (R. 397):

> "Apperson's official duties, as the indictment clearly alleges, required him to protect the government property on the base. * * *"

We submit that the foregoing is a misdescription of the indictment. The word "protect" occurs nowhere in the in-

dictment, nor does the indictment contain any synonym therefor. No language is employed in the indictment (R. 2-4) which directly or indirectly suggests that Apperson's official duties "required him to protect the government property on the base." We may assume, without conceding, that the inclusion of such an allegation in the indictment would have rendered unavailable to petitioner any argument predicated upon the insufficiency of the indictment in relation to this material and important allegation. However, the deficiency cannot be supplied by the Court's assertion that the indictment clearly alleges something of which it contains no part. The effect of the observation by the Court of Appeals, professing to note in the indictment language which is absent therefrom, is to suggest that that Court exhibits some measure of agreement with our argument for the mandatory character of such an allegation. The many cases we have cited are uniform in insisting upon this requirement, and the Ninth Circuit herein, in applying a contrary rule, has deviated from the established law in all other circuits, with the result that a grave injustice is bound to ensue to any individual accused by an indictment in such utterly deficient form. We respectfully urge that this Court should grant certiorari so as to correct this unsalutary divergence from the established law relating to the form and sufficiency of criminal indictments, particularly in bribery cases where representatives of the government may be involved.

Wholly apart from the foregoing deficiencies of the indictment, an independent inadequacy is its reference to Apperson as a certain "officer and person acting for and on behalf of the United States in an official function" (R. 2, 3). The purpose of such an allegation is doubtless to bring the case within the scope of 18 U. S. Code, Sec. 201, which denounces the promising, offering or giving of a bribe to any one of three classes of individuals, to wit, an officer, an employee and a person acting for or on behalf of the United States in an official function. We omit as not pertinent herein several other classes of individuals, such

as officers and persons acting for either House of Congress. The difficulty with the indictment under consideration is that the government could describe Apperson as a person of the class described or as an officer, but might not disjunctively describe him as either. That this is so follows necessarily from the circumstance that an officer belongs to one class of individuals and a person acting for the United States belongs to a different class of individuals, and it is incumbent upon the prosecution to declare with precision in which category it places him. That is the effect of the well reasoned holdings in *United States* v. *Kemler* (D. C. Mass.), 44 F. Supp. 649, and *Shields* v. *United States* (App. D. C.), 26 F. 2d 993. Any defendant charged under this statute has the right to be informed from the language of the indictment of the exact capacity in which the alleged offeree or donee was acting, and petitioner herein raised the point both on his motion to dismiss the indictment (R. 6) and on his motion for judgment of acquittal (R. 12-13). In ignoring this contention, the Court of Appeals took a position contrary to the holdings in the First Circuit and in the District of Columbia, an independent difference of sufficient importance to be deserving of final authoritative review.

2

The Government failed to prove that the supposed offeree of the bribe was vested with any authority or official duty concerning the sale or disposition of Government surplus property, and otherwise failed to prove the commission of a crime within the intent of the applicable statute.

The proof adduced at the trial failed completely to show the existence in the officer alleged to have been bribed of any official duty relating to the sale or disposition of the property involved. The statute whose violation petitioner is charged with provides that the gravamen of the offense

is the intent to influence the decision or action of the offeree in a matter pending before him in his official capacity, or causing him to collude in the commission of a fraud or inducing him to do any act in violation of his lawful duty. Unless one of these acts is proven, the crime is not committed. An inspection of the evidence and the according to it of an interpretation least favorable to petitioner reveals that petitioner and Apperson made an agreement to permit petitioner to include in merchandise allegedly purchased by him certain other wares which were the property of the Government and for which no payment was made. If this occurred, petitioner's acts constituted a larceny with Apperson's co-operation. (Nothing contained in this argument is intended to constitute any reflection upon Apperson's honesty, although, as we do urge elsewhere, his acts of instigation were such as to amount to a form of entrapment.) But this situation does not add up to one of the types of offenses denounced by the statute. The cardinal and controlling fact is that Apperson actually had no duty or official capacity whose performance or omission could make it the possible statutory subject matter of the crime. The situation is illustrated by considering a hypothetical case. If the petitioner entered the Air Corps office and offered the telephone operator a sum of money if she permitted him to steal certain merchandise, and she agreed (whether dishonestly or in order to facilitate the arrest of petitioner), it could scarcely be urged with any validity that petitioner would thereby be violating 18 U. S. Code, Section 201. Since the telephone operator had nothing to do with the merchandise or its handling, no payment to her to collude in pilferage could constitute the statutory offense. Her mere knowledge of contemplated larceny might enable her to report and prevent it, but would not alter the picture in the eyes of the law. Although Apperson's position was not quite so obvious, a study of the pertinent portions of the record leads inescapably to the conclusion that his official functions and duties did not embrace the delivery

of the merchandise allegedly attempted to be stolen. While it is true that a correct determination of this point calls for a study of the entire record, we shall indicate concisely several aspects of the proof which combine to show that the acts in question, far from being comprehended within his duties or functions, affirmatively bore a contrary character.

The proof offered by the Government showed that Apperson had no authority to make a spot sale of the property involved (R. 67-77), and that his only authority in this regard was in the matter of scrap lumber (R. 101-102). Nor could he have legally accommodated petitioner so as to permit the immediate removal of the merchandise (R. 149, 150). Indeed, Apperson could not have lawfully delivered the property to petitioner even though the latter had paid for it (R. 191-192, 230-231). Authorization therefor would have to come from the Commanding General of the Air Material Command (R. 87). While the indictment described Apperson as "Air Force and Base Salvage Officer" (R. 2-3), the special order (R. 141, 340) gave him "primary duty as salvage and property disposal officer". The Government attempted to supplement this by parol proof (R. 140-142), over objection, and the discrepancy constituted a fatal variance.

In addition to the variance mentioned on the issue of the official capacity of the officer or person sought to be influenced, and in addition to the failure to prove the official function or duty, there was a further variance in that the proof offered by the Government even to show the identity of the "Salvage and Property Disposal Officer" (although the indictment used the title "United States Air Force and Base Salvage Officer") did not correspond to the name set forth in the indictment. The indictment (R. 2-4) gave the name as "Harvey B. Apperson." The documentary proof of the designation of the Salvage and Property Disposal Officer established his identity as "First Lt. Harvey D. Apperson, Jr." or "Harvey O. Apperson, Jr." This variance was promptly objected to both at the time of the in-

troduction of the testimony (R. 140-141) and on the motion for directed judgment of acquittal (R. 14-15). The rejection of this contention by the Court of Appeals is not in consonance with its ruling in *Carney* v. *United States* (C. C. A. 9, 1947), 163 F. 2d 784, where it was held that the amendment with consent of counsel of a portion of an indictment charging that defendants counterfeited K-14 h gasoline ration coupon, so as to charge defendants counterfeited A-14 h gasoline ration coupons was reversible error, for there was no authority in any court to amend or alter an indictment without reassembling the grand jury; so that there was a failure to prove the crime charged despite the inadvertent character of the misdescription. We submit that in the instant case the error was more marked, for herein the deficiency was one of proof rather than allegation. Of course, the most significant flaw in the Government's proof on this aspect of the case is that Apperson was described in the indictment as being one official and the proof showed that he was actually something substantially different, the difference being extremely pertinent in a case where the issue of guilt or innocence could clearly turn upon the precise duties with which a Government officer was vested. The Court may well take judicial notice that the exact duties of every government employee or official are meticulously prescribed, so that those required to be performed by a man bearing one title could not ordinarily be exactly coextensive with the bearer of a different title. See *Krichman* v. *United States*, 256 U. S. 363, 65 L. Ed. 992; *Kubler* v. *United States* (C. C. A. 3), 79 F. 2d 440.

The indictment herein stated that the offer (or promise), as well as the alleged payment, was made with the intent to influence Apperson "on a certain matter then pending before him in his official capacity" (R. 2, 3). What the pending matter was is covered by no allegation. In addition, the proof failed completely to show that the attempted influencing of decision and action related to any "matter then pending before him in his official capacity." The proof is clear that all matters actually pending before Apperson

in his official capacity, namely, the purchase and sale and the payment therefor—the transaction which was the purpose of his trip to Montana—had been completely concluded, including payment in full by petitioner, and that Apperson had no further official duty with regard to petitioner. Notwithstanding this status of the matter, the representatives of the government—and this is also of interest in connection with the entrapment point hereinafter considered—evolved some fresh matter and attempted, albeit unsuccessfully, to bring it within the scope of Apperson's supposed duties so as to furnish a background for a bribery prosecution. Neither the manual nor the official order, any more than testimony of the witnesses, succeeded in establishing that Apperson had an official duty or that any matter was "then pending" before him in his official capacity. The record can be searched in vain for proof and the interpretation of the official duties can be distorted in vain, but nothing is adduced which brings the dealings between petitioner and Apperson either within the language of the indictment or the scope of the statute. The bribery statutes, any more than those relating to tax frauds, narcotics or other aspects of federal jurisdiction, should not be strained so as to permit the government to concoct alleged duties or to characterize them as pending officially when in fact they do not, for the purpose of enlarging the scope of penal statutes. When such extreme steps are taken as herein, and they have been approved by the Court of Appeals, we feel that this Court should exercise its corrective powers so as to bar prosecutions that are far outside of the manifest legislative purview.

Nothing in the record affords the slightest indication of any decision or action required to be officially taken by Apperson, who had no power to order the removal of merchandise from warehouse 1045—what was involved—or from any other locality without detailed compliance by the recipient with the entire routine of public sale and competitive bidding. Since Apperson's authority was limited to the disposition of scrap lumber, it was clear, and

he so testified, that no proceeding looking towards the disposition of property could be inaugurated without the prior approval and co-operation of Lieutenant Greene (R. 100-102). Therefore, in order to consummate a scheme whereby petitioner or anyone else might obtain salvage property without payment therefor, the process would have necessitated approval of the various higher officers as well as a complete revision of the procedure in the manual. Apperson's own authority was so limited that he could not on any view of the regulations or evidence be deemed an officer in a position to effect a delivery or transfer in violation of some fancied duty. In short, there was nothing for Apperson to decide and no action to be taken by him. Accordingly, a payment to him for some illusory permission was not equivalent to influencing decision or action (the language of the indictment) in respect to disposal of salvage property so as to render petitioner guilty of the crime charged. Regardless of how petitioner's acts are viewed and to what criticism they may be subject, this cannot serve to make up for the omission to show the offering of a bribe related to the performance of an official function. As in *Blunden* v. *United States* (C. C. A. 6, 1948), 169 F. 23 991, where there was no entrapment and the defendant's acts were denounced by the Court, the absence of this requisite element of the crime calls for the dismissal of the indictment.

3

The Government made improper references to other offenses allegedly committed by petitioner.

Both in the opening address to the jury (R. 51-52, 57) and in the testimony (R. 220-221), the prosecution broadly suggested that petitioner was guilty of other crimes. In fact, the Assistant United States Attorney recognized that he might have "overstepped the bounds of propriety" and joined in asking that the jury be instructed to disregard what he had said (R. 52). The result was that petitioner

was depicted as an individual who made a practice of fraud and that he had made improper overtures to the witness Aulgur as well as to Apperson. Since these matters were not charged in the indictment, they were clearly inadmissible, nor could they be justified on the need to show motive or intent in a situation otherwise equivocal.

This constituted a grave invasion of defendant's rights, as is attested by a long line of controlling cases in this Court, such as *Boyd* v. *United States,* 142 U. S. 450, 35 L. Ed. 1077; *Greer* v. *United States,* 245 U. S. 559, 62 L. Ed. 469; *Michelson* v. *United States,* 335 U. S. 469, 93 L. Ed. 168 and *Krulewitch* v. *United States,* 336 U. S. 440, 93 L. Ed. 790. In the case last cited Mr. Justice Jackson declared:

> "A naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practising lawyers know to be unmitigated fiction."

The improper references tended to deprive petitioner of a fair trial. The Court of Appeals took the view that the objectionable matter was admissible as showing petitioner's state of mind (R. 399) and considered it admissible under its own prior ruling in *McCoy* v. *United States* (C. C. A. 9), 169 F. 2d 776. We submit that this view is contrary to rulings in other circuits, such as *Templeton* v. *United States* (C. C. A. 6), 151 F. 2d 706 and *United States* v. *Dressler* (C. C. A. 7), 112 F. 2d 972.

4

The Trial Court erroneously received in evidence prejudicial testimony of one Walker concerning three alleged telephone conversations with petitioner in the absence of any proper foundation or identification of the person with whom those conversations were had.

One Walker testified for the Government that he received several telephone calls from an individual who identified

himself as petitioner. Prompt objection was taken to this testimony (R. 208) on the ground that no proper foundation was laid through the recognition of the voice of the other party. The subsequent testimony did not supply the omission, and several exceptions were taken (R. 208, 209, 210, 217). The testimony as to the conversation was of a character which indicated that petitioner was interested in perpetrating some irregularity (210-212, 213) and was extremely prejudicial. Independent exception was taken to the testimony on the ground that it was prior to the transaction specified in the indictment (R. 220-221) and inadmissible in any event.

The evidence should have been rejected under the holdings in other circuits, such as *Robilio* v. *United States* (C. C. A. 6, 1923), 291 F. 975, cert. den. 263 U. S. 716, 68 L. Ed. 522; *Wallace* v. *United States* (C. C. A. 6), 291 F. 972, and *United States* v. *Frankel* (C. C. A. 2, 1933), 65 F. 2d 285, cert. den. 290 U. S. 682, 78 L. Ed. 588.

5

The Trial Court erroneously refused to permit petitioner's counsel to inspect memoranda used by the witness Matthews to refresh his recollection.

Special Agent Matthews testified at length (R. 270-274) concerning certain conversations with petitioner after the arrest, the purpose of this evidence being to corroborate Apperson's testimony of his dealings with petitioner. The witness referred to his contemporaneous notes to refresh his recollection (R. 272-273). Counsel for petitioner was improperly denied permission to examine these notes.

This ruling was contrary to the established law, which is concisely stated in Underhill on Criminal Evidence, 4th Edition, Section 395, as follows:

> "Memoranda used by a witness to refresh his memory must be made available for inspection and use of the adverse party."

Federal Courts have uniformly held to the same effect, as appears from the decisions in *Brownlaw* v. *United States* (C. C. A. 9, 1925), 8 F. 2d 711; *Taylor* v. *United States* (C. C. A. 8, 1927), 19 F. 2d 813; *Lennon* v. *United States* (C. C. A. 8, 1927), 20 F. 2d 490, and *Luse* v. *United States* (C. C. A. 9, 1931), 49 F. 2d 241.

The denial of this important right to petitioner foreclosed a significant avenue of potential cross-examination, and the very unwillingness of the Government to make the data available is indicative of an intent to withhold information of probative value to the defense.

6

The undisputed evidence showed an elaborate plan to entice petitioner to offer a bribe, so as affirmatively to sustain his defense of entrapment and to necessitate a judgment of acquittal, or, in any event, to require the submission of that issue to the jury.

In dealing with this point the learned Court of Appeals simply said (R. 401), "There is no substantial evidence of entrapment in the record. See Sorrells v. United States, 287 U. S. 435". However, in the very case cited the Supreme Court of the United States held (by Mr. Chief Justice Hughes):

> "We are of the opinion that upon the evidence produced in the instant case the defense of entrapment was available and that the trial court was in error in holding that as a matter of law there was no entrapment and in refusing to submit the issue to the jury."

In the same opinion (at p. 444) this Court declared:

> "The Federal Courts have generally approved the statement of Circuit Judge Sanborn in the leading case of Butts v. United States (C. C. A. 8), 18 A. L. R. 143, 273 Fed. 38, supra, as follows: 'The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and

> create crime for the sole purpose of prosecuting and punishing it. Here the evidence strongly tends to prove, if it does not conclusively do so, that their first and chief endeavor was to cause, to create, crime in order to punish it, and it is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it.' The judgment in that case was reversed because of the 'fatal error' of the trial court in refusing to instruct the jury to that effect."

The separate concurring opinion in the same case by Mr. Justice Roberts, with Mr. Justice Brandeis and Mr. Justice Stone agreeing, stated:

> "Public policy forbids such sacrifice of decency. The enforcement of this policy calls upon the court, in every instance where alleged entrapment of a defendant is brought to its notice, to ascertain the facts, to appraise their effect upon the administration of justice, and to make such order with respect to the further prosecution of the cause as the circumstances require."

It is also noteworthy that the Court in the same case cited with approval *United States* v. *Lynch* (D. C. N. Y., 1918), 256 F. 893, wherein the facts closely resemble the instant case. There Hough, D. J., wrote:

> "A man who expected to be an officer in the United States Army, and had a very good reason to believe that he would soon be commissioned, was asked what he would want out of a government contract over which he seemed—only seemed—to have some control. He replied most properly, most honorably, 'nothing', because he was about to become an officer; and there the matter dropped on that occasion."

Later, at the instigation or by the order—and the Court said it made no difference which—of government officers

comprising the Department of Military Intelligence, the offeree told defendant that he had reconsidered the question and in effect asked for the money. The Court held that this constituted "provoking and creating a crime", saying further:

> "Border line cases are difficult, and doubtless it is usually best to leave the matter to the jury when and if, in view of the evidence, a reasonable man would be justified in holding that the accused had the intent or desire to do that for which he was indicted, and seized and swallowed the bait that was laid for him."

On the foregoing facts the Court held that the prosecution was "an endeavor to punish a crime which would never have been committed if it had not been for the request of the government officer", and thereupon peremptorily advised the jury to acquit the defendant.

It will be observed that the ruling of the Court of Appeals herein is contrary to its previous decisions in *Woo Wai* v. *United States* (C. C. A. 9, 1915), 223 F. 412, and *Sam Yick* v. *United States* (C. C. A. 9, 1917), 240 F. 60, as well as holdings in other circuits, such as *Gargano* v. *United States* (C. C. A. 5, 1928), 24 F. 2d 625; *Ybor* v. *United States* (C. C. A. 5, 1929), 31 F. 2d 42; *Newman* v. *United States* (C. C. A. 4, 1924), 299 F. 131, and *Capuano* v. *United States* (C. C. A. 1, 1925), 9 F. 2d 41.

With these authorities in mind, we are impelled to the conclusion that a great volume of the evidence on the trial was strongly indicative, if not absolutely probative, that the petitioner was entrapped. The jury was specifically advised that there was no defense of entrapment in the case (R. 360-361). The point was abundantly reserved by motions and exceptions (R. 339, 348, 351, 352, 374, 376).

We now come to an examination of the record with a view towards determining what it contains to substantiate the defense of entrapment. Of course, this is a matter not to be weighed by the inspection of mere excerpts, but is peculiarly one which calls for a study of all the proof:

naturally our stress of certain elements is not to be regarded as suggesting the exclusion of everything else. The prosecution was concerned about the question, for in the very opening it was said that after Apperson procured authority from the army to cooperate with the Federal Bureau of Investigation and the United States Attorney's office (R. 46):

> "* * * Lieutenant Apperson was very carefully cautioned that in no particular should he encourage the defendant, Meyer Schneider, but to let him take the reins, as the saying might be, and to be the driving force and merely accede to any wish of the defendant's he might express and just let him go and see how far he would go. Lieutenant Apperson expressed a willingness to cooperate. * * *"

Apperson testified that on the occasion of his first meeting with petitioner, the latter examined certain shirts, trousers and other items in the warehouse and inquired how he might obtain them (R. 86-87). Apperson said that this would mean a spot sale, as to which he "very carefully explained to him I had no such authority"—something most significant on another phase of our argument (Point 2). Since petitioner had already made a legitimate purchase of other property, "he wanted to know if maybe we could swap or get together" (R. 87). This in itself is certainly ambiguous language. The witness evidently did not understand the remark *in mitiori sensu*, for his response was (R. 87), "I then didn't commit myself much one way or the other". However, the witness thereupon offered to show petitioner the merchandise he had purchased and drove him from the office to the salvage yard (R. 87). When petitioner supposedly stated that he was prepared to pay "to substitute some of the useful items for this scrap" (R. 88), the witness "indicated then I didn't want to have any part of it" (R. 89). Then they went to a coffee shop together, where, the witness said (R. 89-90), "I told him, well, I was very non-committal, I didn't say one way or another". When petitioner had left, Apperson reported to the Officer of

Special Investigation that an attempt had been made to bribe him, whereupon the Federal Bureau of Investigation, the Base Commander and the United States Attorney swung into action with the very evident purpose of contriving that this matter should not end then and there (R. 90-94). As Apperson stated to Mr. Matthews, the Federal Bureau of Investigation agent (R. 92), "I indicated my willingness to cooperate in any way I could". If petitioner had any original evil intent and Apperson showed himself to be non-committal, there surely was a *locus poenitentiae,* but the law enforcement officials and the higher army officers—including Colonel Chennault, who was Base Commander, and Colonel Abdalah, Staff Judge Advocate (R. 92)—acting in conjunction with Apperson, were manifestly determined that this was a fish to be hooked.

So, on the following afternoon Apperson met petitioner in the little Base Salvage office, where, as he described it (R. 94),

> "I pitched a jacket file in front of Schneider; that jacket file contained a complete list of the useful items, useful salvage items that we have in storage as salvage at that time * * *. He opened it. I did indicate to him or point to the total value, that is the original purchase price to the Government. I pointed to that. Schneider shook his head and then shook his head and indicated that was accepted."

Here we have a vivid picture of Apperson actually submitting to petitioner a list of items of merchandise and the petitioner shaking his head to indicate acceptance. It must be remembered that Apperson was supposedly acting on the instructions of his superiors and Special Agent Matthews, who was himself an attorney (R. 275), and was presumably attempting to avoid any semblance of entrapment. Nevertheless, the foregoing excerpt, even after we make due allowance for the intent of the witness not to disclose himself as the initiating force, affords a striking analogy to the legal concept of the making of a contract with Apperson in the role of the offeror while petitioner

"shook his head and indicated that was *accepted*". The jacket file will be discussed again below.

After this "acceptance", according to the witness, petitioner said nothing, and the very next thing we find happening is that Apperson explains to petitioner as follows (R. 95):

> "I explained to Schneider then that he would have to pay my boys or my enlisted men for loading the stuff and it would have to be loaded after hours * * *."

So, in addition to furnishing a list of suitable items to petitioner, the witness went ahead to explain the procedure whereby the goods were to be taken away. After he "advised him of that situation" (R. 96), petitioner agreed to the arrangements and then (R. 97), "We went to the freight car and started loading the clothing which was put up in cartons into this truck to haul to the freight car." Sergeant Aulgur testified that it was Apperson who gave instructions as to the manner of loading (R. 223-224). After the truck was loaded (R. 98), "We followed the truck down to the freight car and watched the men unload it into the freight car". This activity took from 4.30 until about 6 P. M. (R. 99-100).

The witness and petitioner then went to Murrill's Bar, where they had a few drinks (R. 107). Apperson left him and went into the men's room, where Special Agent Matthews searched him as part of the plan (R. 107). Apperson and petitioner left the bar and walked down Central Avenue to the Park Hotel, where they went up to petitioner's room (R. 108) under these circumstances, according to the witness, "I expressed the desire for another drink and he said he had some good Scotch so we went to his room". There the parties had a conversation with regard to a certain claim of appellant's with War Assets (R. 108-109). After they had a drink, petitioner tendered $1,400 to the witness. He then testified (R. 110):

> "Q. And what did you do or say? A. Well, I was dissatisfied."

Thereupon petitioner gave him another $100, or $1,500 in all. The significance of this element of the transaction cannot be over-emphasized. Here from Apperson's own lips, despite his supposed mighty striving to occupy a passive, non-entrapment position in the deal, we see him actively protesting the amount tendered and by his conduct insisting upon extracting a greater sum. Since 18 United States Code Section 201 permits the imposition of a fine three times the amount of the bribe—and such triple fine was actually imposed in this case—we find a situation wherein at the very least a portion of the bribe was affirmatively and exclusively evoked by the witness (and not originally offered by petitioner) and wherein such increased bribe could and did have the effect of augmenting the punishment to which he has been subjected. Thus *pro tanto* there was an undeniable case of entrapment. If this does not taint the entire scheme to involve petitioner in the commission of bribery, the minimum effect ascribable to it is that it gives considerable color to the contention of entrapment and requires that the entire issue should have been submitted to the jury.

Cross-examination of Apperson accentuated his affirmative actions in causing the removal of the merchandise (R. 159):

> "Q. But notwithstanding the fact that he didn't pay for it you removed it from the warehouse, loaded the truck and put it right on the car, didn't you? That is a fact? A. I removed it from the warehouse and put it on the railroad car?
>
> "Without having Mr. Schneider pay for it? A. That is right."

So it is plain that Apperson's part in the loading and removal of the goods was not that of a passive observer. Moreover, he made it clear that he accommodated petitioner and furnished the labor (R. 154), and that Colonel Chennault had given him a letter permitting him to go ahead and cooperate (R. 164).

When it came to suggesting payment of the alleged bribe, one would expect that in this prosecution the prime mover would be petitioner, but Apperson's testimony establishes that he himself took the initiative at a crucial moment (R. 170):

> "Q. Well, did you request Mr. Schneider to pay you right at the bar? A. I suggested that we settle up.
> "Q. Right at the bar? A. Yes, I think I did there at the bar."

So Apperson was not only quite anxious to get the money from petitioner, but also would have preferred that the payment be in the presence of witnesses, saying (R. 199):

> "At the time in Murrill's I more or less, well, I delayed, I stayed at Murrill's as long as we could hoping he would pay off in front of any witnesses that might be there. And we also had a pre-arranged signal that I should drop a handkerchief or napkin when he had paid off * * * after we left Murrill's Bar and went to the Park Hotel I suggested we have another drink and hoping he would go into the bar and pay me and thereby still having witnesses * * *."

Apperson was therefore concerned not only that the amount of the bribe should be as large as possible, but also that it be handed over quickly and in such a locality as to make the transfer visible to the several prepared witnesses in the establishment.

The cross-examination of Apperson also threw important light upon the inception of the plan—one of the crucial factors in any determination of whether there was an entrapment. Apperson was asked what he did at the beginning of the interview, and he said (R. 204):

> "I placed the file with those turn-in slips in front of him."

Petitioner's counsel asked whether the witness intended to catch petitioner. After some objection, the Court para-

phrased the question and obtained an answer thus (R. 204-205):

> "The Court: Was this the beginning of the plan or whatever it was? A. Yes, sir. I just put this thing in front of him to see what he would do.
>
> "Q. Well, what was it you put in front of him? A. The file with the turn-in slips in it.
>
> "Q. With what slips? A. These turn-in slips. These 447s we call it.
>
> "Q. What did you do that for? Was it pursuant to a conversation you had with him? A. No, sir, I just told him what I had.
>
> "Q. That is, you mean what salvage or property you had? A. Yes.
>
> "Q. Salvage property? A. Yes.
>
> "Q. Did he say anything about a list or wanting to see a listing or anything of that sort? A. No.
>
> "Q. How did you happen to do it. What suggestion did you surmise? A. I guess just to show him what I had, that is all.
>
> "Q. And in pursuance to some conversations you had had theretofore in regards other purchased property was that in answer to something he talked to you about? A. No, sir, he hadn't mentioned it at all.
>
> "Q. Well, was it pursuant to his visit? I am trying to get at how it happened, what preceded it? A. Nothing. He was just in my office and I just threw this file in front of him to see what he would do to see if he was interested in that stuff.
>
> "Q. Was that the first interview you had with him? A. No, this was the second day.
>
> "Q. This was the second day. Oh, after he made the offer to you? A. Yes."

At this point petitioner's counsel resumed cross-examination and elicited the following (R. 206):

> "Q. Lieutenant Apperson, that was after the arrangement was made with Mr. Matthews? A. That is right.
>
> "Q. And that was pursuant to a plan that was the way you would start the thing off? A. It wasn't any plan exactly. It was just an idea I had.

"Q. That was the idea you had? A. Yes.

"Q. Now, that list that you showed him that contained all these goods that really weren't for sale, were they? A. They would have been available.

"Q. But they weren't for sale then? A. No, not that minute.

"Q. You couldn't have sold them to him if you wanted to? A. I explained that to him that I could not.

"Q. But nevertheless you threw the thing at him? A. Yes.

"Q. And the purpose was obviously to follow the plan you pre-conceived in arrangements with Mr. Matthews? A. I would say so, yes."

With due allowance for the abortive discussion of the day before, we submit that the two passages last quoted tend strongly to support the defense of entrapment. The whole theory of entrapment turns upon intention and the state of mind of each respective party, and Apperson, notwithstanding his being a government witness and the admittedly explicit instructions he had received, could not help but disclose *se invito* an attitude of affirmative instigation and shrewd enticement.

Accordingly, if the plan to give and accept a gratuity is scanned from its genesis to its consummation, we find that Apperson, guided by his mentors, was far from passive; that he was not merely receptive; but that he was actually the driving force in virtually every phase. An impartial view of the evidence cogently suggests that the undisputed proof showed entrapment as matter of law, and, without prejudice to that contention, the least to which petitioner was entitled was to have the jury pass on the question under appropriate instructions.

If the evidence adduced by the Government is weighed in the light least favorable to petitioner, it would appear that petitioner made a suggestion to Apperson susceptible of the inference that petitioner desired to compensate Apperson for giving petitioner some improper advantage in obtaining property. When it appeared that Apperson

was "very non-committal"—to use his own language (R. 90)—his unreceptiveness might well have inclined petitioner towards complete abandonment of any illicit project. Certainly there is no presumption of law that a defendant who makes an inquiry in the nature of an improper overture must intend to pursue it to the point of ultimate consummation. Indeed, the very fact that the Government and all of its instrumentalities concerned in the transaction deemed it necessary and advisable to conceive and resort to the elaborate plan which they adopted is strongly indicative that it was the opinion of all concerned that petitioner had abandoned the idea and might do nothing further unless he was stimulated, incited and encouraged anew. This view is fortified by the important circumstance that the only "matter then pending before him in his official capacity"—in the language of the indictment (R. 2-3)—and which had actually brought petitioner to Montana was already completely consummated, and the Government found it necessary to clothe Apperson with some semblance of authority (which he did not actually possess) regarding the merchandise in warehouse 1045 so as to furnish a suitable subject matter for the supposed commission of an offense. If petitioner had in fact abandoned all thought of seeking any undue advantage from his dealings with Apperson because of the latter's non-committal reaction, there was abundant evidence to justify the jury in concluding that the plan carried out to fruition by the government's representatives was one of their own creation and certainly one in which they took such active steps to bring it to completion as to constitute a substantial case of entrapment.

The question of major importance for determination by this Court is whether an individual who has taken a step in furtherance of some criminal plan may not lawfully be viewed as having abandoned his intent under the circumstances disclosed. In other words, if he has in fact given up the thought of perpetrating a crime (as the jury may well find), but the representatives of the Government,

whether because of their failure to recognize that abandonment or their strong determination to translate the original intent into a full-blown criminal act, are insistent upon rekindling the original plan and leading him on to its culmination, is he to be deprived of the defense of entrapment which would be available if he were not the complete originator of the scheme? It appears from the prior holdings of this Court, which we have discussed above, that the crucial question in every entrapment question is the determination of who was responsible for the inspiration to commit the crime. It is likewise evident that where the inception of the crime is shrouded in some doubt and where its initiation partook of joint activity at various times by both the defendant and a representative of the Government, the issue is clearly one to be resolved by a jury under appropriate instructions. The holding of the Court of Appeals herein has the effect of nullifying this rule and rendering it impossible for a repentant defendant, who did nothing more than take a step which he sought to retrace, to escape the pressure or importuning subsequently placed upon him by government agents who are overzealous to reinstate that intent. Such a rule would in a vast number of cases tend to encourage entrapment and render persons liable to punishment who, under the law as previously announced, would not be regarded as guilty. In the case at bar, we feel that an objective consideration of the evidence should clearly have limited petitioner's original alleged participation in the illegal enterprise to the aspect of offering or promising (dependent upon which interpretation is placed upon the ambiguous first count), while it must be remembered that the indictment herein charges not only the so-called offer but also the substantive offense of bribery (R. 3-4) in the second count. At the very least it must be recognized that the series of acts which we urge as constituting entrapment completely embraced the alleged act of bribery, and although the entrapment argument is cogently applicable to all aspects of the case, it is virtually conclusive on the count charging the giving of a bribe.

In view of the frequently declared and humane policy of the law to promote rehabilitation and to encourage persons who have elected to abandon illegal or criminal plans, we feel that it would be a step in the wrong direction to qualify that policy by a determination that the person who wishes to forgo a projected crime must nevertheless continue at the mercy of government officials anxious to create materials for prosecutions, and must therefore be inevitably doomed by their unjustifiable activities. This Court should, we submit, assume jurisdiction of the cause and clarify the law so as to put a halt to any trend in supposed law enforcement which may have the effect of creating criminals rather than preventing the commission of crimes.

CONCLUSION

For the reasons stated in the foregoing petition and brief, it is respectfully submitted that the application for a writ of certiorari should be granted.

Dated: New York, N. Y., February 6, 1952.

Respectfully submitted,

JACOB W. FRIEDMAN,
Attorney for Petitioner.

LOUIS M. LEIBOWITZ,
of Counsel.

INDEX

CITATIONS

CASES:	Page
Berger v. *United States*, 295 U. S. 78	6, 8
Bryan v. *United States*, 338 U. S. 552	8
Carney v. *United States*, 163 F. 2d 784, certiorari denied, 332 U. S. 824	6
Hagner v. *United States*, 285 U. S. 427	6, 8
Hopper v. *United States*, 142 F. 2d 181	6
United States v. *Bickford*, 168 F. 2d 26	6
United States v. *Michelson*, 165 F. 2d 732	6
United States v. *Stillman*, 177 F. 2d 607	6

STATUTES AND RULES:

United States Code:	
18 U. S. C. 201	1
Federal Rules of Criminal Procedure:	
Rule 7(c)	6
Rule 52(a)	6

MISCELLANEOUS:

Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (Wolfson and Kurland ed., 1951), secs. 130, 133, pp. 231-234, 238-240	4

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 575

MEYER SCHNEIDER, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On June 9, 1949, an indictment in two counts was returned in the United States District Court for the District of Montana charging petitioner with violating 18 U.S.C. 201,[1] in that he promised

---

[1] "Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any

and gave a bribe to an officer of the United States (R. 2-4). Petitioner was tried, found guilty (R. 18), and was sentenced generally to imprisonment for one year and six months and to pay a fine of $4500 (R. 19-21).

On August 21, 1951, the Court of Appeals for the Ninth Circuit reversed the judgment and remanded the cause with directions to grant a new trial (R. 392-405) on the sole ground that the trial court erred in its instructions on the element of intent (R. 401-404).[2] The Government has not petitioned for certiorari. Petitioner seeks a direction of acquittal instead of a new trial.

The Government's evidence established that petitioner was the successful bidder for the purchase of certain surplus scrap wool and cotton materials

---

official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both."

[2] Petitions for rehearing by both sides were denied on December 11, 1951 (R. 406). On December 31, 1951, petitioner's time for filing a petition for a writ of certiorari was extended to February 9, 1952, by order of Mr. Justice Douglas and the petition was filed on that date.

which were stored at the Air Force base in Great Falls, Montana (R. 78-79). On November 22, 1948, petitioner arrived at the base and met Lieutenant Apperson, the base salvage officer (R. 63), in the latter's office (R. 85, 219). Thereafter, while visiting the warehouse containing the scrap material, petitioner inquired as to useful salvage material, and proposed that he and Lieutenant Apperson get together and substitute some of the useful salvage items for the scrap petitioner had purchased. He stated that he would take any amount of such useful items, and would give Lieutenant Apperson "half a quid to a couple Gs," and that he had " 'the money right here' and slapped his brief case to indicate he had a couple Gs to take care of me." (R. 87-88). Petitioner mentioned that a lot of money could be made by doing business "in that fashion" (R. 89).

Lieutenant Apperson remained noncommittal to petitioner's proposals, but promptly informed his superiors and the Federal Bureau of Investigation (R. 90-91). He was instructed to accede to petitioner's requests, but not to solicit him in any manner (R. 198).

On November 23, 1948, almost a warehouse full of salvage material not purchased by petitioner was loaded onto trucks and then onto a freight car under his direction (R. 96-97). Later in the day, in petitioner's hotel room in town, he gave $1,500 to Lieutenant Apperson in an envelope (R. 110-112). As soon as Lieutenant Apperson reached

the lobby of the hotel he handed the sealed envelope containing the money to agents of the Federal Bureau of Investigation (R. 112-113), who immediately arrested petitioner (R. 258).

Not content with his success in securing a reversal of his conviction, petitioner seeks review here (Pet. 3) of the same specifications of error he urged unsuccessfully below (R. 386-388). The Court of Appeals considered these fully and its opinion demonstrates their lack of merit (R. 392-404).

With respect to those questions relating to alleged errors at the trial, there is no reason for this Court to consider petitioner's contentions at this interlocutory stage. These questions may or may not survive a new trial. If they do, petitioner's right to seek ultimate review here will not be prejudiced by denial of the present petition. The case involves no unusual circumstances or questions of great public importance such as to merit consideration at this time. See Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (Wolfson and Kurland ed., 1951), secs. 130, 133, pp. 231-234, 238-240.

Petitioner's contentions as to the sufficiency of the indictment also seem premature. However, the Court of Appeals' decision that the indictment is sufficient has greater finality, and it is appropriate to discuss those contentions here.

1. In support of his contention that the indictment is insufficient as a matter of law, petitioner relies upon three alleged defects (Pet. 7-14).[3]

First, petitioner states that the first count of the indictment is captioned "Offer of Bribe," but in fact charges a promise of a bribe. From this fact

---

[3] The first count is as follows:

The Grand Jury Charges:

Count One
(Offer of Bribe)
(18-201)

That on or about the 22nd day of November, 1948, in the state and district of Montana and within the jurisdiction of this Court, Meyer Schneider unlawfully and feloniously promised money to a certain officer and person acting for and on behalf of the United States in an official function, to-wit: Harvey B. Apperson, First Lieutenant, United States Air Force and Base Salvage Officer of the Great Falls United States Air Force Base, as the defendant well knew, for the purpose and with the intent to influence the decision and action of the said Harvey B. Apperson in his official capacity and function, as aforesaid, on a certain matter then pending before him in his official capacity, as the defendant well knew, and for the purpose and with the intent to influence the said Harvey B. Apperson, as aforesaid, to allow and make opportunity for the commission of a fraud on the United States and to induce the said Harvey B. Apperson acting as aforesaid, as the defendant well knew, to do an act in violation of his lawful duty, as the defendant well knew, in respect to the disposal of salvage property of the United States, as aforesaid." (R. 2-3.)

The second count is couched in substantially the same language except that it charges the actual payment of money to Lieutenant Apperson (R. 3-4).

alone, petitioner argues that he is not sufficiently apprised of the offense with which he was charged (Pet. 8-11). The rule of *Carney* v. *United States,* 163 F. 2d 784 (C.A. 9), certiorari denied, 332 U.S. 824, relied upon by petitioner, to the effect that a federal court cannot permit amendments to the charging allegations contained in the body of an indictment, does not affect the rule that a distinction must be drawn between the body and the caption of an indictment and that since the caption is not controlling, erroneous recitals therein do not vitiate the indictment. *United States* v. *Stillman,* 177 F. 2d 607, 611 (C.A. 9); cf. Rule 7(c), F. R. Crim. P.

Since the allegations contained in the body of count one of the indictment clearly charge only a promise of a bribe, the caption is a technical error at most.[4] In the present posture of the case petitioner cannot be misled as to the charge contained in the first count. The formal defect in the caption is therefore not prejudicial and must be disregarded. *Berger* v. *United States,* 295 U.S. 78; *Hagner* v. *United States,* 285 U.S. 427; *United States* v. *Bickford,* 168 F. 2d 26, 27-28 (C.A. 9); *Hopper* v. *United States,* 142 F. 2d 181 (C.A. 9); Rule 52(a), F. R. Crim. P. Even if there was a

---

[4] *United States* v. *Michelson,* 165 F. 2d 732 (C. A. 2), does not distinguish between "to offer" and "to promise," as petitioner suggests (Pet. 9, 10), but rather between "to offer" and "to give." The court concluded that the latter act involved an element not found in the former.

lack of clarity in the trial judge's instructions as to the offense charged in count one (see Pet. 10), this can be rectified upon the new trial.

Petitioner's second and third contentions respecting the alleged legal insufficiency of counts one and two may be considered together. He urges, in essence, that the indictment is fatally defective in that it fails to describe the official function or duties of Lieutenant Apperson or the decision, matter or action involved (Pet. 11-13). As is fully demonstrated in the opinion below (R. 394-397), this argument is without merit.

The statute itself and the cases construing it show that there is no violation of the law unless certain requisites are met. The person bribed must be an officer of the United States or a person acting for or on behalf of the United States in an official function. The indictment alleged that petitioner promised and gave money to—

> a certain officer and person acting for and on behalf of the United States in an official function, to wit: Harvey B. Apperson, First Lieutenant, United States Air Force and Base Salvage Officer of the Great Falls United States Air Force Base * * *.

These allegations clearly fulfill these requirements of the statute. They describe Apperson as an officer of the United States Air Force who was acting on behalf of the United States and his capacity and function as base salvage officer at the Great

Falls base. The further allegation that the promise and bribe were "in respect to the disposal of salvage property of the United States" is a sufficient description of the matter involved. Together, the allegations are sufficient to inform petitioner of the offenses with which he is charged and to safeguard him against further prosecution for the same offenses. No more is required. *Berger* v. *United States,* 295 U.S. 78; *Hagner* v. *United States,* 285 U.S. 427.

2. Petitioner also claims, in effect, that he is entitled to an acquittal because the proof was insufficient to show that Lieutenant Apperson had a duty or official capacity, the performance or omission of which could be influenced by petitioner's acts, so as to constitute a violation of 18 U.S.C. 201 (Pet. 14-19). The Court of Appeals, however, held the evidence sufficient to "support the conclusion that Schneider offered the bribe to Lieutenant Apperson to cause the latter to fail to do his duty as the Base Salvage Officer" (R. 397-398). Even if that court had found a deficiency in the evidence in the respect claimed, petitioner would have been entitled to no more than the judgment he secured, i.e., a reversal and remand with directions to grant a new trial. *Bryan* v. *United States,* 338 U.S. 552.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

JAMES M. MCINERNEY,
Assistant Attorney General.

ROBERT S. ERDAHL,
JAMES T. KELLS,
Attorneys.

MARCH 1952.

☆ U.S. GOVERNMENT PRINTING OFFICE 1952—992345/P.O.885

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 313

MEYER SCHNEIDERMAN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION AND BRIEF IN SUPPORT OF APPLICATION FOR ALLOWANCE OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Theodore W. Kheel,
Attorney for Petitioner,
100 Broadway,
Borough of Manhattan,
City of New York.

INDEX

	PAGE
PETITION FOR REHEARING	1
BRIEF ON APPLICATION FOR REHEARING	3
1	3
2	4
3, 4 and 5	4
6	4
CONCLUSION	5

MISCELLANEOUS

18 U. S. Code, Sec. 201	1
Bryan v. United States, 338 U. S. 552, 94 L. Ed. 335	4
Sorrells v. United States, 287 U. S. 435, 77 L. Ed. 413	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 575

MEYER SCHNEIDER,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Meyer Schneider, respectfully prays this Court to reconsider its determination made on April 1, 1952, which denied his petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review a judgment rendered by that Court on August 21, 1951. That judgment reversed a conviction of petitioner for a violation of 18 U. S. Code, Sec. 201, and directed a new trial. The original petition herein was filed on February 9, 1952.

The Court is referred to the original petition and brief, the contents whereof are hereby reiterated and incorporated.

The questions at issue involve important points of criminal law and procedure, all of them of a character frequently arising in federal courts. It is desirable that they be clarified by a plenary review, to the end that the law be settled or better understood, and, more specifically, that this petitioner should not be retried where the law indicates that the indictment be dismissed, or, in any event, that he be not subjected to a retrial involving the hazard of repetition of several important errors committed on the first trial.

Your petitioner therefore respectfully submits that rehearing should be granted herein and the determination of this Court denying the writ of certiorari set aside and such a writ granted to review the judgment of the United States Court of Appeals for the Ninth Circuit.

April 24, 1952.

JACOB W. FRIEDMAN,
Attorney for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 575

MEYER SCHNEIDER,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

BRIEF ON APPLICATION FOR REHEARING

The same order of discussion of points involved is preserved herein as in the original application.

I

We urge that the indictment fails to charge a crime in that it confuses offer and promise and neither count describes the duties or official function of the person bribed or promised to be bribed, or the decision, matter or action involved. The government urged that the contentions as to the sufficiency of the indictments seemed premature (brief, p. 4). We fail to see any justification for this assertion. If the indictment is insufficient, it is manifest that it should be dismissed and petitioner not subjected to another trial thereunder. The substantial shortcomings which we have indicated are of a character condemned in other circuits, and it is desirable that the Supreme Court should declare the applicable law.

2

The failure of the government to prove that the supposed offeree of the bribe actually had no authority or official duty in the premises was fatal to the prosecution. Nor was this a situation in which a new trial could conceivably alter the inferences to be drawn from the evidence. The government cited (brief, p. 8) *Bryan* v. *United States,* 338 U. S. 552, 94 L. Ed. 335, as justification for a holding that deficiency in the evidence entitled petitioner to no more than a new trial. However, an examination of that case discloses that the ratio decidendi was an express determination that "the defect in the evidence might be supplied on another trial." The comprehensive presentation of the duties and powers of the official involved herein was such as to negative the possibility of any contrary implication or proof, so that the rule of that decision is not applicable.

3, 4 and 5

Petitioner pointed out three clear errors committed on the first trial, dealing respectively with improper references to other offenses, the receipt of independent evidence and the denial of the right of petitioner to inspect certain memoranda. The Court of Appeals rejected these arguments, notwithstanding different holdings in other circuits, and in any event petitioner is entitled to a new trial untainted by the repetition of those errors. It is desirable that multiplicity of litigation be avoided by authoritative pronouncement on the several points.

6

The government completely failed to discuss our contention that there was clear proof of entrapment, sufficient to require a judgment of acquittal or at the very least the submission of that issue to the jury. The rules laid down

by this Court in *Sorrells* v. *United States,* 287 U. S. 435, 77 L. Ed. 413, were completely ignored, as were various decisions applying those principles to different sets of facts. There seems to be no reasonable excuse for subjecting petitioner to a trial in which he will again be deprived of this substantial defense. Inasmuch as the jury could, upon any fair view of the case, be justified in finding that the plan herein carried to the point of consummation by the government's representatives was one which had its inception in their own intent and that they took active steps to bring it to completion, the deprivation of this defense was plain error. This Court should, it is submitted, rule on the point at this stage and not leave its resolution to the extended process of a new trial and possible further appeals. This particular question is the outgrowth of an expanding practice in supposed law enforcement whose necessary effect is to create crimes rather than prevent their commission.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully urges this Court to rescind its determination made on April 1, 1952, denying his petition for a writ of certiorari and that it grant such writ to the United States Court of Appeals for the Ninth Circuit to review its judgment herein.

New York, New York, April 24, 1952.

JACOB W. FRIEDMAN,
Attorney for Petitioner.

LOUIS M. LEIBOWITZ,
of Counsel.